United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL
WITH PROOF
OF SERVICE

76-6191

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee-Appellant,

and

JOSEPHINE Mc[illegible],

Plaintiff-Intervenor-Appellee-Appellant,

-against-

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant-Appellant-Appellee.

ON APPEAL FROM A FINAL ORDER AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR KALLIR, PHILIPS, ROSS, INCORPORATED, DEFENDANT-APPELLANT-APPELLEE

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Statement Of Facts

Appellee, Josephine McGee, was an employee of appellant, Kallir, Philips, Ross, Inc. (KPR), from 1967 to May of 1973. KPR is a pharmaceutical advertising agency, which has among its clients the Upjohn Company (Upjohn). Ms. McGee's first position with KPR was as an administrative assistant at an annual salary of $8,000.00. In 1968, she was promoted to assistant account executive to Mr. Norman Cooper on the Cooper Laboratories account, and she remained in this position until September, 1969 when she became account administrator on the Upjohn account. In less than a year she was again promoted to account executive on the Upjohn account. Finally, in September of 1972, she was promoted to senior account executive on the Upjohn account. Her annual salary was now $18,000.00.

At some point in the end of 1972, Ms. McGee learned that other senior account executives -- all men -- were making more money; the fact had come to her attention that at least one was earning $25,000.00. On December 4th, she met with Mr. Kallir, president and principal stockholder of KPR, and requested that her salary be brought into parity with that of her male counterpart. Mr. Kallir advised her that her request would be duly considered at the annual salary review meeting of the executive committee, which was scheduled to meet in April, 1973. In the meantime, he advised her to submit a sample market plan so that the committee

could accurately assess her qualifications for the substantial raise she was requesting (Tr. 13-15).

Apparently dissatisfied with the lack of immediate action taken on behalf of her request, Ms. McGee filed a charge of sex discrimination with the New York City Commission on Human Rights (NYCCHR). During the course of its investigation of appellee's charge, the NYCCHR requested that she submit a job description letter, specifically outlining the duties and functions of a senior account executive at KPR (Tr. 20-21). Instead of asking any official or employee of KPR to furnish her with such a letter, Ms. McGee, under the unsubstantiated assumption that no one there could provide such an item (Tr. 48-51), contacted an employee of KPR's major client, Upjohn, by the name of Phyllis Korzilius. Ms. Korzilius was the product manager at Upjohn and the person with whom Ms. McGee was in most frequent contact with respect to the account. Appellee described to her the type of letter she needed, telling her that it would be used in connection with a sex discrimination complaint that she had filed against the agency. (Tr. 55). Ms. Korzilius told her that she was "for it" and that she "thought she had a lot of courage" (Tr. 234), and she shortly thereafter sent appellee the letter, which was then turned over to the NYCCHR (Plaintiff's Exhibit No. 5, App. A-12).

Early in 1973, KPR found itself for the first time in a competitive position with another agency for new business from Upjohn, which was introducing a new product and wanted a full

advertising campaign for it. It was decided that KPR would provide a preliminary, "dry run" presentation of its proposed campaign to certain Upjohn representatives in February of 1973. At trial, Ms. McGee admitted that this presentation was "extremely important" in terms of business to the agency (Tr. 60). Therefore several KPR employees, including appellee and Mr. Lilker, a senior vice-president and account supervisor who was also her superior in charge of the Upjohn account, went to Upjohn and participated in the presentation. Despite the acknowledged importance of the presentation and the necessity of the agency presenting to the client a united front intended to gain the client's acceptance of the marketing plans, Ms. McGee, to the surprise of nearly all in attendance, began to interfere with the presentation by interrupting and sarcastically criticizing Mr. Lilker in the presence of the Upjohn representatives (Tr. 165, 189-90).

Because of appellee's central position in the presentation due to her position of senior account executive on the Upjohn account, KPR had little choice but to send her to the main presentation in March (Tr. 168-69). With the exception of small incidents, such as speaking out of turn and handling areas which had been assigned to other persons, Ms. McGee's behavior posed no problems, in sharp contrast to the earlier presentation (Tr. 166) In the meantime, as her complaint was being investigated by the NYCCHR, Ms. McGee embarked upon a course of conduct that was becoming increasingly hostile and disruptive of the functions of appellant agency (Tr. 119), notwithstanding the fact that there

had been no change in KPR's attitude toward her subsequent to her filing of the charge (Tr. 61-62). In fact, Ms. McGee had been given even greater responsibilities and more challenging duties, as evidenced by her employment on the presentation "teams". Certain executives at KPR, including Mr. Kallir, were also beginning to suspect that Ms. McGee had made some people aware of her discrimination case and "were being enlisted by her on her side" (Tr. 125). However, they lacked any tangible proof of such indiscretions. Such was forthcoming on March 13, 1973.

On March 13, 1973, pursuant to NYCCHR procedure, a fact finding conference was held with respect to Ms. McGee's claim. In attendance were appellee, Commission representatives, Mr. Kallir and other representatives of KPR, including its attorney, Mr. Kaufman. In the course of an inquiry into the scope of appellee's duties, the Commission supervisor produced the Korzilius letter. The reaction of the KPR representatives, excluding Ms. McGee of course, was immediate and unequivocal. They were incensed that someone in the delicate position of account executive could be so indiscreet and misguided so as to involve one of the agency's largest clients in her own internal dispute.

It was felt by the executives at KPR that such conduct could jeopardize the Upjohn account (Tr. 206). One KPR executive later testified how, after 20 years experience in the business, he knew how easily a small problem could erupt into loss of the client (Tr. 230). Ms. McGee herself at trial later indicated

that, because the function of a senior account executive is to insure that the client-agency relationship be maintained at the optimum level, it would be an abuse of such position to convey an internal problem at the agency to the client (Tr. 57).

The executive committee now possessed the concrete evidence that it had previously lacked. Its actions were immediate and forthright. A meeting was held where it was decided that Ms. McGee would have to be removed from the Upjohn account lest she continue in her divisive course and be responsible for the loss of the account (Tr. 130). It was felt that KPR could ill afford having Ms. McGee agitating people at Upjohn against KPR on behalf of her case (Tr. 131), and that she was polarizing certain people within the client's organization (Tr. 132). Because there was no other work in the agency to which to assign her, it was decided that she would be suspended with pay. However, first it would be necessary to clear the decision with those at Upjohn (Tr. 132). For this reason, Mr. Kallir met with Upjohn's Mr. Henry and Mr. Shea sometime around the 20th of March. Neither had any objections to her removal from the account. Mr. Kallir had planned to explain the entire situation concerning the discrimination charge from the beginning, and was taken by surprise when Mr. Shea replied that he and others at Upjohn had been aware of Ms. McGee's discrimination case (Tr. 132), thereby contradicting her later claim that it had been kept confidential.

On March 26, 1973, Mr. Kallir handed appellee a letter informing her of her suspension (Plaintiff's Exhibit No. 6, App.

A-13). He also caused to be circulated at KPR an internal memorandum explaining the reasons for her suspension, dated March 27, 1973 (Plaintiff's Exhibit No. 7, App. A-14). On the same date, appellee filed a new complaint with NYCCHR charging KPR with retaliatory conduct. On May 15, 1973, after concluding that there was no position to which appellee could be transferred, KPR informed her of her discharge (Tr. 136).

The NYCCHR thereafter turned the complaint over to the Equal Employment Opportunity Commission (EEOC), which, after passing upon the merits of appellee's claim and determining that there was insufficient evidence to sustain her original charge of sex discrimination, commenced this action against KPR in the Southern District of New York. Appellee was granted leave to intervene. The EEOC charged KPR with unlawful employment practices by engaging in retaliatory conduct against appellee in violation of §704(a) of Title VII of the Civil Rights Act of 1964 (Act). After a trial on the merits, the court found KPR guilty of the charge and awarded judgment in favor of the plaintiff-intervenor, appellee. The parties were unable to resolve the issue of applicable damages, and the court ordered a reference in front of a Magistrate. Months after a lengthy hearing, the original Magistrate died and another one reviewed the transcript and ruled as to the amount of damages incurred by appellee. The court, however, made its own assessment and awarded Ms. McGee an amount which took into account all fringe benefits and yearly raises and in addition awarded her a year's salary prospectively. Appellant now appeals

the decision of the lower court with respect to both liability and damages.

Preliminary Statement

The decision of Hon. Judge Edward Weinfeld in EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975), finding that appellant KPR's discharge of appellee, plaintiff-intervenor, Ms. McGee, constituted illegal retaliatory conduct in violation of §704(a) of the Act, 42 U.S.C. §2000e - 3(a) (1970), and thus awarding appellee damages, including a prospective annual salary, was based upon a clearly erroneous interpretation of the facts, as evidenced by its failure to consider the entire record before the court, and upon a misapplication of and a failure to appreciate controlling law.

The ruling by the court that KPR violated §704(a) of the Act because it was not justified in discharging appellee on the grounds that she had involved the client in an internal dispute was arrived at by the court without full appreciation of the nature of appellant's business. Thus the court was in error in declaring that KPR had no valid business reason to justify appellee's dismissal. The court failed to inquire into the subjective state of mind of appellant at the time of the incident and the reasonableness of its assessment of the possible consequences of her actions. Instead, the court focused upon the eventual outcome, that in fact the business relationship with the client was not affected. Such a standard is without support in the case law. Furthermore, the court declared that §704(a) protected appellee in her acquisition of information with which to prosecute her claim of sex discrimination.

The court, in its attempt to justify her actions, inadvertently broadened the scope of protection that the statute provides an employee to such an unprecedented extent that the intent of Congress has been completely thwarted and the managerial prerogatives of the employer all but completely suspended.

The court was also incorrect in characterizing appellant's second justification as "sheer pretext." It seemingly ignored all evidence that appellee's conduct at the February presentation was viewed by several Upjohn and KPR representatives as potentially damaging to the relationships between the two companies. Moreover it ignored evidence that clearly established that KPR had communicated this dissatisfaction to appellee in her suspension letter, and it chose instead to stress its conclusion that this was being presented for the first time at trial, thus indicating to it the groundlessness of appellant's proffered reason.

The court also was in error in declaring that appellee was protected in her discussions with other KPR employees informing them of their rights under the Act and encouraging the filing of further complaints. It failed to consider various factors which can remove such activities from the protective cloak of the Act. Furthermore, the court incorrectly assumed that because the appellant discharged appellee for a partially discriminatory reason, that, notwithstanding the validity of its other two reasons, a violation of the Act must automatically be

found. Such a per se treatment ignores the test which has become predominant in the Second Circuit and other Circuits throughout the country.

Assuming arguendo that appellant is held liable for retaliatory conduct, the amount of back pay awarded to appellee should be greatly reduced. Appellee failed to take reasonable steps in obtaining interim employment in the field of her own specialized experience. By applying to only two pharmaceutical advertising firms in the entire New York area, by sending out only 19 resumes over 19 months following her discharge, by employing unreasonable methods to obtain alternative employment, and by unreasonably ceasing any efforts to contact prospective employers subsequent to September, 1975, the appellee evidenced a woeful lack of diligence in mitigating any damages. Further, the court below erred in disallowing testimony as to certain private loans given to appellee during the interim period since there was a question as to whether said loans were to be paid back by appellee.

There is no record to support an award since February 25, 1976 of back pay. Since there is no evidence Appellee has been unemployed since the magistrates hearing it is error to award her back pay for this period.

Finally, the award to appellee of one year's future salary was erroneous since the court below failed to offer any reasonable justification for the award or any safeguards by which such payments could be made without unduly prejudicing the rights of the appellant.

A R G U M E N T

Point

I

THE RULING BY THE LOWER COURT THAT APPELLANT WAS NOT JUSTIFIED IN DISCHARGING APPELLEE FOR INVOLVING A CLIENT IN AN INTERNAL DISPUTE AND FURTHER THAT SUCH DISCHARGE WAS A VIOLATION OF TITLE VII OF THE ACT WAS ERRONEOUS AND MANDATES REVERSAL

The characterization of appellant's defense that appellee was justifiably discharged for her conduct involving its client in an internal dispute as "lacking in substance", and the finding that such termination constituted retaliatory conduct in violation of Title VII of the Act were based upon unwarranted conclusions of law and misapplication of the facts. The lower court failed to appreciate the almost singular nature of appellant's business in reaching its conclusion that no proper business reason was responsible for appellee's discharge. This omission was further compounded by the erroneous application to the facts of a result-oriented test which finds no support in the law. Finally, the court extended all too broadly the protection afforded an employee by Title VII by holding that such conduct by appellee fell within the category of a "protected activity".

a) Appellant Had Sufficient Business Justification To Discharge Appellee

There is no way that the question of whether

Ms. McGee's conduct with respect to the client, Upjohn, sufficed as good cause to terminate her employment can be resolved without due consideration of the peculiar nature, pressures and sensitivities inherent in the advertising industry. It is evident from the opinion of the lower court that this was not done. Such failure by the court to consider all the evidence before it warrants reversal. See Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 444-45 (1968).

The known, highly competitive nature of the advertising industry renders client-agency relationships extremely fragile and susceptible to the slightest adverse pressures. Thus it is essential to the point of survival that an agency, such as KPR, maintain and promote the optimum image of confidence, aptitude and creativity to its clients, lest they fall prey to the other agencies which actively seek their business. As the agency's sole representative to Upjohn, a large account representing one million dollars or ten percent of appellant's annual billings, Ms. McGee had the burden of always presenting the agency in the best possible light. Hers was a trusted position, requiring tremendous sophistication and discretion. By involving Upjohn in her internal conflict with KPR, Ms. McGee proved that she was no longer deserving of such trust. Thus her suspension and ultimate discharge were aptly compelled by sound business

reasons.

Ms. McGee's position with KPR was within a sophisticated and complex employment setting, strikingly similar to the one considered by the Court of Appeals for the First Circuit in Hochstadt v. Worcester Foundation For Experimental Biology, 545 F.2d 222 (1976). The employee there was a research scientist who after filing a complaint with the EEOC persisted in a course of conduct which was disruptive to the functions of her employer. As a result, she was discharged for her hostility, uncooperative attitude and disruptive influence. In affirming a finding of no retaliatory conduct, the court stated:

> The requirements of the job and the tolerable limits of conduct in a particular setting must be explored.

Id at 231. Ironically, the court then went on to state that the above approach was consistent with that of the lower court in the instant case, citing EEOC v. Kallir, Philips, Ross, Inc. supra, when a careful review of all the evidence clearly indicates that here such detailed exploration was lacking in the court's first opinion. Nevertheless an appreciation of appellee's complex position was belatedly discovered by the court in its subsequent opinion awarding damages but denying reinstatement:

> In this case the job from which plaintiff was discharged required a close working

> relationship between plaintiff and top executives of defendant. It also involved frequent personal contact with defendant's clients, with plaintiff acting as defendant's representative. Lack of complete trust and confidence between plaintiff and defendant could lead to misunderstandings, misrepsentations and mistakes, and could seriously damage defendant's relationship with its clients. The situation here is quite unlike that presented when reinstatement is sought for an assembly line or clerical worker, or even for an executive whose job is not as sensitive for his employer's interests as is plaintiff's job here. The Court is convinced that after three and a half years of bitter litigation the necessary trust and confidence can never exist between plaintiff and defendant. To order reinstatement on the facts of this case would merely be to sow the seeds of future litigation, and would unduly burden the defendant. Thus, reinstatement will not be ordered in this case.

EEOC v. Kallir, Philips, Ross, Inc., Opinion On Damage Assessment And Reinstatement at 16-17 (emphasis supplied) [hereafter cited as Opinion]. (App. A-251-52).

The lower court found that up to the time of appellee's suspension, "no KPR official expressed any displeasure because of her [discrimination] charge, or indicated that any action would be taken against her. She continued to perform her usual duties." 401 F. Supp. at 69. In fact, KPR assigned her to even more critical and prestigous duties, namely the two presentations before Upjohn officials in early 1973, which were aimed at acquiring additional business. The court's ultimate conclusion that she was discharged for having filed a discrimination charge is inconsistent with its finding

that the treatment afforded her had remained unaffected by her complaint with NYCCHR, quite opposed to the situation in Francis v. American Telephone & Telegraph Co., 55 F.R.D. 202 (D.D.C. 1972), where retaliation was found because of a marked and demeaning shift in the employer's treatment of the employee upon her filing of a charge with the EEOC.

The discovery of the job description letter from Ms. Korzilius, the product manager at Upjohn, by KPR's president, Mr. Kallir, and its other representatives, perforce altered the situation entirely. Ms. McGee, it was then learned, had gone beyond the bounds of discretion and good business judgment by involving a major client in the internal affairs of the agency. Such conduct had the distinct possibility of jeopardizing the aforesaid fragile client-agency relationship. No prior attempt had been made to obtain the requisite job description from any other employee or official of KPR. Ms. McGee seemingly assumed that, because in her opinion Mr. Kallir was incapable of furnishing such information, any other person at KPR would be similarly unsuited (Tr. 48-51). Neither had she attempted to obtain the information from someone at any other advertising or employment agency. Instead she chose, in the first instance, Ms. Korzilius, a course that could have later proved disastrous.

In her zeal to prosecute her case, which by all

means she was entitled to do, Ms. McGee overstepped the limits of sound business discretion which would have been expected of anyone in a similar position. Such a breach of trust by the employee mandates dismissal, notwithstanding the fact of whether the employee was male or female, or had or had not filed a charge of sexual discrimination. An employer is entitled to the loyalty of its employees, see Hochstadt v. Worcester Foundation For Experimental Biology, supra; NLRB v. Red Top, Inc., 455 F.2d 721 (8th Cir. 1972), and can rightfully discharge any employee who interferes with its commercial interests. NLRB v. Red Top, Inc., supra. Even a mere threat to take his or her problems to a customer of the employer is sufficient cause for dismissal:

> The threat made by [the employee] in a letter to the home office to take the problems to the hospital administration constituted an act of disloyalty to the employer's business interests. Red Top's regional director, Denne, stated that he considered this a serious threat, as the hospital had retained the company to relieve itself of these problems. It is a natural inference that if the hospital is involved in these disputes it could become dissatisfied with the company. Unlawful interference with the employer's commercial interests has been recognized as presenting grounds for discharge in NLRB v. Local 1229, IBEW 346 U.S. 464, 71 S.Ct. 172, 98 L.Ed. 195, (1953).

Id. at 727. In the instant case, the appellee went far beyond a mere threat.

In determining whether KPR was justified in so

discharging Ms. McGee, the lower court failed to balance the interests of the respective parties. It ignored the possibility that by her actions she may have placed the Upjohn account in jeopardy as a result of her overzealousness in presenting a case to the NYCCHR. Cf. Gillen v. Federal Paper Band Co., 479 F.2d 97 (2d Cir. 1973) (no retaliation for discharging employee who was uncooperative and a source of continued dissension and who admitted that her attorneys had advised her that it would help her EEOC case if she was fired). Indeed, the court seemed disinclined to rule upon the appropriateness of her solicitation of the Korzilius letter, which "rightly or wrongly she felt could not be obtained from the defendant." 401 F. Supp. at 69 (emphasis supplied).

The court discounted the reasonableness of appellant's reaction by holding that appellee's conduct had "no discernable effect on the agency's relationship with Upjohn." 401 F. Supp. at 72. This analysis, not only misses the point, but is contrary to the law. Essentially, the court applied a result-oriented test -- no effect, no justification -- instead of the well established subjective test of good faith. See EEOC v. Children's Hospital, 415 F. Supp. 1345, 1350 (W.D. Pa. 1976) (whether discharge of employee because of expected budget cuts was in good faith and therefore non-retaliatory must be determined on basis of employer's belief that the cuts were probable and not on fact that the

expected cuts never occurred); cf. Stone & Webster Engineering Corp. v. NLRB, 536 F.2d 461, 467 (1st Cir. 1976). As the court explained in Goodloe v. Martin Marietta Corp., 7 FEP Cases 964 (D. Col. 1972) aff'd, 10 FEP Cases 1176 (10th Cir. 1974), a case involving a charge of retaliatory conduct:

> The issue before us ... was whether defendant violated the Civil Rights Act in discharging plaintiff. In making this determination, we do not sit ... as a reviewing court to determine whether the employer's decision was right or wrong as a matter of business judgment on employer-employee relations. In this field we do not have nor does the EEOC have any expertise. We sit ... to determine whether the company in good faith decided that plaintiff should be discharged because of her conduct, and whether that discharge was or was not related to a violation of plaintiff's civil rights. ... The EEOC should have decided and we shall decide whether there has been discrimination or retaliation under the Civil Rights laws, and in making this decision it should have considered and we shall consider not whether the company's judgment was right or wrong, but whether it was reasonable and in good faith.

The very fact that the letter had ultimately no effect on the Upjohn relationship does not mean that KPR was unreasonable in believing at the time that it could have. By ignoring the test of reasonableness and good faith, and looking only to the lack of effect on the Upjohn account, the court incorrectly held that appellant was wrong in discharging appellee for its stated reason. "Evaluations of evidence reached by the accurate application of erroneous legal standards are

erroneous evaluations." Protective Committee For Independent Stockholders of TMT Trailer Ferry, Inc., supra. Although the findings of fact of the lower court should ordinarily not be set aside, reversal is necessary when, like here, they are clearly erroneous. Smith v. Universal Services, Inc., 454 F.2d 154, 156 (5th Cir. 1972); De Tore v. Great Atlantic & Pacific Tea Co., 411 F.2d 613, 614 (3d Cir. 1969).

b) The Court's Extension Of The Protection Afforded An Employee By Title VII Goes Beyond Legislative Intent And Judicial Interpretation

The solicitation of the Korzilius letter was held by the court to be an activity protected by § 704(a) of the Act, 42 U.S.C. § 2000e-3(a). Thus the appellant, by grounding appellee's discharge upon this conduct, was guilty of retaliation in violation of § 704(a). It was the court's opinion that there was nothing wrong or disruptive in her conduct. It held that activities of appellee in engaging in her statutory right to assist and participate in the investigation of her discrimination charge are protected unless her efforts are "so excessive and so deliberately calculated to inflict needless economic hardship on the employer ... " 401 F. Supp. at 71 (emphasis supplied). By promulgating such broad latitude. within which an employee can remain protected by § 704(a), the court renders the employer powerless in taking any measure to protect its business interest from a negligent or careless

employee who is intent on proving his or her charge at any cost, including the destruction of the employer's business. A review of Congressional intent and applicable case law indicates unequivocally that this is not the law.

Any court which attempts to assess whether a particular activity is protected must employ a rule of reason test, one which balances the rights of the employee in seeking redress for alleged discrimination and the managerial prerogatives of the employer in protecting its business interests.

> In such instances, we think courts have in each case to balance the purpose of the Act to protect persons engaging reasonably in activities opposing sexual discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel. Allowing an employee to invoke the protection of section 704(a) for conduct aimed at achieving purely ulterior objectives, or for conduct aimed at achieving even proper objectives through the use of improper means, could have an effect directly contrary to Congress' goal, by discouraging employers from hiring persons whom the Act is designed to protect. The standard can be little more definitive than the rule of reason applied by the judge or other tribunal to given facts.

Hochstadt v. Worcester Foundation For Experimental Biology, supra, at 231 (emphasis supplied). This approach reflects the view of the framers of the Act.

> [M]anagement prerogatives ... are to be left undisturbed to the greatest extent possible. Internal affairs of employers ... must not be interfered with except to the limited extent that correction is required in discrimination practices.

Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152 U.S. Code Cong. & Adm. News 2431, 2516 (88th Cong. 2d Sess., 1964).

The Act does not provide disgruntled or indiscrete employees with a shield that can also be used as a sword. No automatic insulation from wrongful conduct is provided by § 704(a); neither is the employee licensed to act imprudently, EEOC v. Del Rio National Bank, 12 FEP Cases 1668, 1670 (N.D. Tex. 1975); Goodloe v. Martin Marietta Corp., supra at 964-65; see United States v. Hays International Corp., 6 FEP Cases 1328, 1330 (N.D. Ala. 1973), nor enjoy immunity from discharge for acts disloyal to the employer merely because a discrimination charge was filed. See Mc Donnell Douglas Corp. v. Green, 411 U.S. 792 (1973); cf. NLRB v. Local Union No. 1229, International Brotherhood Of Electrical Workers, 346 U.S. 464, 472, (1953). This is particularly true where the charge of discrimination was filed on account of malice and vindictiveness, Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976), or, as in the instant case, eventually proved to be without merit. See EEOC v. C&D Sportswear Corp., 398 F. Supp. 300, 305 (M.D. Ga. 1975).

To hold, as did the lower court, that if the employer takes steps to avoid the involvement of its client with its internal affairs -- something which would beyond doubt be appropriate in absence of a discrimination charge --

it will be guilty of unlawful retaliation, even though the charge itself lacks merit would, in effect, mean that ordinary management prerogatives become suspended upon a filing of a charge, a position that has been held untenable. See, e.g., Garrett v. Mobil Oil Corp., 531 F.2d 892, 896 (8th Cir. 1976); EEOC v. Del Rio National Bank, supra; Goodloe v. Martin Marietta Corp., supra; cf. Local 357, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen & Helpers Of America, 365 U.S. 667, 679 (1961) (Harlan, J., concurring) ("It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects.").

In a retaliation case the issue is whether the court finds that the discharge was based on the filing of the discrimination, not whether the particular business consideration upon which the employer's action was based was correct, necessary or even desirable. See Point I(a), supra, and cases cited therein. Here the court refused to direct itself to the question of the relevancy of the discrimination complaint, but instead focused with the clarity afforded by hindsight on the incorrect business conclusions reached by the appellant. In so doing, the court ignored testimony of an Upjohn employee, Mr. Shea, who disputed appellee's claim

that her request of Ms. Korzilius remain confidential by stating that it was widespread knowledge at Upjohn that KPR and Ms. McGee were having problems with one another and that the latter had filed a sex discrimination charge. He also testified that the Upjohn account would have been jeopardized had these problems begun to touch Upjohn's president or chairman(Tr. 187-88). These facts were made known to Mr. Kallir prior to his suspending Ms. McGee(Tr. 132-33). In view of such evidence, it is impossible to find that KPR did not then have the reasonable belief that its relationship with Upjohn could be affected, thereby displaying the requisite good faith to refute a retaliation charge.

Point

II

THE COURT'S FINDING THAT APPELLANT'S SECOND CAUSE FOR DISCHARGING APPELLEE, BASED UPON HER DISRUPTIVE BEHAVIOR, WAS "SHEER PRETEXT" WAS AGAINST THE WEIGHT OF THE EVIDENCE

After reciting appellant's right to discharge appellee "in the event of inadequate job performance or for the failure to follow orders at a presentation to a client ... , " 401 F. Supp. at 72, the Court dismissed its justification for appellee's discharge as "sheer pretext" because it was advanced for the first time at trial, more than two years from the event. Id. The appellant had offered ample evidence that during a preliminary presentation in front of Upjohn representatives, Ms. McGee was highly disruptive and derisive of her supervisor, Mr. Lilker. Evidence was offered which underscored the importance of the presentation to KPR, which for the first time was placed in a competitive position vis-a-vis a rival agency for a campaign to promote a new product line. Ms. McGee herself admitted on the stand to the critical nature of the presentation (Tr. 60). Appellant even offered testimony of Mr. Shea, an employee of Upjohn who had attended the presentation, describing Ms. McGee's demeanor there as interuptive and contradictory(Tr.190). Evidence was finally admitted by the testimony of Mr. Kallir and, especially, Mr. Cooper, KPR's executive vice-president

and member of its executive committee, that, due to the delicate nature of client-agency relationships which can be jeopardized by any type of negative behavior, KPR had to consider Ms. McGee's suddenly disruptive conduct -- particularly her behavior at the first presentation -- as likely interfering with the working relationship with Upjohn and therefore mandating her suspension from the account (Tr.206-10). Nevertheless, in spite of all these valid business considerations, the court ruled that these reasons were no more than an "eleventh-hour" afterthought on the part of the appellant.

The court apparently based this erroneous conclusion on two factors. First, the court questioned the length of time it took until the conduct at the presentation was finally disclosed as a cause of appellee's discharge. Obviously the court failed to construe both the suspension letter of March 26, 1973 and the intra-office memorandum dated the following day which inferentially refer to the incident in question.(Plaintiff's Exhibits 6,7, App. A-13,14). Second, the court was not impressed with the seriousness of appellee's misconduct because of KPR's decision to use her for the second, more important presentation. "If, as defendant now asserts, plaintiff's alleged obstructive conduct at the February meeting was the reason for her suspension, one is moved to inquire why action had not been taken at that time and why plaintiff was called upon to continue her duties in March at

the second presentation." 401 F. Supp. at 73. Again, the court failed to consider all the evidence on the record. Mr. Kallir had testified that the reason for KPR's seemingly inconsistent action was threefold: (1) Ms. McGee was part of the presenting team; (2) she was the only senior account executive on the account; and, perhaps most significantly, (3) the importance of the occasion might prevail upon her to become "part of the team." (Tr. 168).

Appellee's conduct at the meeting, which parenthetically remains unrebutted by her, constituted by itself sufficient grounds for her suspension. When it became evident to those at KPR that there was no other account on which to place her, the only warranted action was her discharge. Because such grounds alone would have led to termination of her employment, the court as a matter of law could not have ruled that they constituted pretext, and that the real cause was the appellee's discrimination charge. The burden was on the plaintiff to "at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge ... ." NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (2d Cir. 1965); see also NLRB v. Milco, Inc., 388 F.2d 133, 138 (2d Cir. 1968). Because appellee failed to sustain this burden, the charge of retaliation must fail as a matter of law.

Point

III

APPELLANT'S ADMISSION THAT APPELLEE'S ACTIVITIES CONCERNING OTHER EMPLOYEES CONSTITUTED IN PART THE REASON FOR HER DISMISSAL DOES NOT MANDATE A FINDING OF RETALIATORY CONDUCT

During the course of her case with the NYCCHR up to the time of her suspension, appellee had discussed the details of her sex discrimination charges with several female employees of the appellant. She also advised at least one of them to file a complaint on her own behalf. Appellant admitted that these acts in part played a role in its decision to suspend appellee. The trial court seized upon this admission, and, after declaring that these activities were protected by § 704(a) of the Act, 42 U.S.C. § 2000e-3(a)(1970), held that by "discharging plaintiff, at least in part because she engaged in these protected activities, defendant violated the statute." 401 F. Supp. at 71. It went on to state that even if KPR was in fact motivated by Ms. McGee's faulty presentation in February, the finding that the decision was based partially upon impermissible factors, i.e. her activities concerning fellow employees, renders the suspension and subsequent discharge illegal. Id. at 72n.17.

In point of fact, the court's conclusion that these activities were under the protection of § 704 is not as firmly established in the case law as the court's language would appear

to indicate. For instance, under the National Labor Relations Act[1] an employer has the right to maintain and expect the discipline of its employees. See McDonnell Douglas Corp. v. NLRB, 472 F.2d 539, 545 (8th Cir. 1973). Thus it may forbid union discussions during "company time." United Aircraft Corp. v. NLRB, 440 F.2d 85, 96-97 (2d Cir. 1971); NLRB v. Reeves Broadcasting & Development Corp., 336 F.2d 590, 593 (4th Cir. 1964). Similar rules govern Title VII activities, as outlined by the court in Hochstadt v. Worcester Foundation For Experimental Biology, supra:

> Certain broad premises can be accepted with confidence. Congress certainly did not mean to grant sanctuary to employees to engage in political activity for women's liberation on company time, and an employee does not enjoy immunity from discharge for misconduct merely by claiming that at all times she was defending the rights of her sex by "opposing" discriminatory practices. An employer remains entitled to loyalty and cooperativeness from employees . . . .

Id. at 230.

On the basis of the record below, there is insufficient

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1. It is well settled that there is a close analogy between Title VII of the Act and § 158 of the National Labor Relations Act. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974).

> The framers of Title VII stated that they were using the NLRA as a model. 110 Cong Rec 6549 (1964)(remarks of Sen. Humphrey); id. at 7214 (interpretative memorandum by Sens. Clark and Case).

Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.11 (1975).

evidence to determine whether appellee's advocacy occurred on company time or interfered with the loyalty and cooperativeness of other KPR employees. Thus it would be necessary to remand the case to the district court for fuller inquiry into the issue of whether these activities merited the Act's protection. However, this may not be necessary, for, even assuming arguendo that they represented impermissible grounds, one of the other two reasons offered by appellant would sustain a finding of no retaliatory conduct.

In holding that there had been a violation of the Act, the trial court relied on a line of decisions of this court construing a similar situation under § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)(1970), which hold that if a "discharge was even partially motivated by [the employee's] union activity, there is a violation . . . ." NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941, 945 (2d Cir. 1971); NLRB v. Gladding Keystone Corp., 435 F.2d 129, 131-32 (2d Cir. 1970). These cases seem to conflict with decisions of the First, Fourth and Ninth Circuits which require that the impermissible reason be the dominant cause before a violation will be found. See, e.g., NLRB v. Circle Bindery, Inc., 536 F.2d 447. 451 (1st Cir. 1976); NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804, 807 (4th Cir. 1975); Famet, Inc. v. NLRB, 490 F.2d 293, 296 (9th Cir. 1974). However, the two lines of cases are not as disparate as one would at first expect. In

NLRB v. Fiber International Corp., 439 F.2d 1311, 1315 (1st Cir. 1971), the court denied the Board's petition for rehearing on the grounds that the dominant factor test did not impose an undue burden upon the Board in its attempt to establish a violation under § 8. It disagreed with the contention that the rule was at variance with those imposed by the other Circuits, including the Second:

> In support of its petition the Board cites some fifteen cases, listing them by circuit. While none states that the improper motive must be "dominant," we consider the language of several to be indistinguishable. It is true that the Board cites cases using general phrases indicating that a "partial" motive that is improper is enough. Some of these, however, proceed, in discussing the evidence, to apply a standard not significantly different from ours. No case cited by the Board articulates a lesser requirement for finding a discharge to be an unfair labor practice. Even NLRB v. Whitfield Pickle Co., 5 Cir., 1967, 374 F.2d 576, on which the Board particularly relies, after saying that the "anti-union motive need not be dominant," goes on to say that the Board must show "that the employee would not have been fired but for the anti-union animus of the employer." 374 F.2d at 582. The only opinions not expressing that standard express none at all. We decline to delete the word "dominant."

Id. (other citations omitted).

The Second Circuit, NLRB v. Milco, Inc., supra; NLRB v. Park Edge Sheridan Meats, Inc., supra; NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 464 (1973); NLRB v. L.E. Farrell Co., 360 F.2d 205, 208 (1966), enunciates a standard not

all that dissimilar to the dominant factor test. They require that before the trier of fact declare that the permissible reason was sheer pretext that it decide that an anti-union employee would not have been discharged for the same conduct. Applying such a rule to the case at bar, unless it was satisfied that another senior account executive who did not file a discrimination charge would not be discharged for conduct similar to that of Ms. McGee, the court could not conclude that KPR's reasons lacked substance or represented sheer pretext. This is true even where a charge of sex discrimination is established, unlike the instant case. See Gillen v. Federal Paper Board Co., 12 FEP Cases 1329 (D.Ct. 1975). In Gillen, the court, in refusing to award the plaintiff damages for having been passed up for a promotion because of her sex and because of the lack of her qualifications, held:

> It is quite clear that Congress did not intend to make employers liable for dismissals or refusals to promote that are only partially based on discriminatory considerations. . . . My finding upheld by the Second Circuit, was that Gillin's lack of qualifications would have prevented her from receiving the promotion she sought. Her sex was not the sole cause of the result. Thus, she is not entitled to back pay.

Id. at 1333. Such reasoning is consistent with the very language of § 706(g) of the Act, 42 U.S.C. § 2000e-5(g)(1970), quoted in part by that court:

> No order of the court shall require the . . . reinstatement . . . of an individual as an employee, or the payment to him of any back pay, if such individual was . . . suspended or discharged for any other reason other than discrimination on account of race, color, religion, sex or national origin . . . .

Id. (emphasis supplied).

Applying the law to the instant case, even if appellee was dismissed for partially discriminatory reasons, due to the fact that she would have been dismissed for her other actions, she has failed to establish a violation of § 704. Thus reversal is in order or, at the very least, a remand to the district court to determine on the basis of the entire record whether such grounds independently constituted sufficient cause for dismissal.

Point

IV

ASSUMING ARGUENDO THAT APPELLANT HAS VIOLATED SECTION 704 OF THE CIVIL RIGHTS ACT, THE AMOUNT AWARDED AS BACK PAY WAS INCORRECT BECAUSE APPELLEE, JOSEPHINE MCGEE, FAILED TO MAKE DILIGENT EFFORTS TO MITIGATE HER DAMAGES

Even if this Court should find that the appellant, Kallir, Philips, Ross, Inc. [KPR] violated § 704 of the Civil Rights Act of 1964 by engaging in retaliatory conduct,[2] it is vigorously contended that the amount of back pay fixed by the court below was incorrect since appellee, Josephine McGee, failed to take reasonable efforts in securing other suitable employment in mitigation of her damages. Although it is true that the burden of showing mitigation or "amounts earnable with reasonable diligence by the person or persons discriminated against"[3] rests upon the appellant, it is equally true that a discriminatee must make a reasonably diligent search for suitable interim employment.[4] It will be shown, and the record readily reveals, that the appellee acted unreasonably in searching for alternative work and that contrary to the finding below, the appellant sustained its burden of proof.

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2. 42 U.S.C. § 2000e-3(a) (as amended).

3. 42 U.S.C. § 2000e-5(g).

4. See, e.g. J.H. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223, 241 (5th Cir.), cert. denied, 414 U.S. 822 (1973).

It has now been established that:

> [i]n order to be entitled to back pay, an employee must at least make reasonable efforts to find new employment which is substantially equivalent to the position which he was deprived of, and is suitable to a person of his background and experience.

NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5th Cir. 1966).

In the case at bar, the facts reveal that the course of conduct undertaken by Ms. McGee with respect to her search for other employment, was not reasonable nor diligent. As such, the holding below must be overturned; for, as it has been recognized:

> Congress evidently intended that the award of back pay should rest within the sound discretion of the trial judge. Although appellate courts are loathe to interfere with the exercise of such discretion by a trial court, it is recognized that it is not free from appellate scrutiny.[5]

Head v. Timkin Roller Bearing Co., 486 F.2d 870, 876-77 (6th Cir. 1973).

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5. Generally, the rule to be applied in appellate review where the trial has been without a jury is that the judge's finding must stand unless "clearly erroneous." Fed. Rules Civ. Proc. 52(2). In this regard, a finding is clearly erroneous "when although there is evidence to support [the finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." U.S. v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The rule itself applies to erroneous factual inferences made from undisputed facts. Commissioner v. Duberstein, 363 U.S. 278, 291 (1960).

a) Appellee's Efforts To Secure Employment In Her Specialized Field Were Unreasonable And Not Diligent

Turning to the record, it can be seen that the number of advertising firms within the New York area specializing in Ethical Drugs was relatively few during the period in question. This number was variously fixed at between 8 to 16 (Ref.Tr. 333), 12 to 14 (Ref.Tr. 412) and 20 (Ref.Tr. 435). The appellee, herself, stated that her field was a "very inbred industry... People go from company to company very quickly..." (Ref.Tr. 131). Yet, the fact is undisputed that Ms. McGee contacted only two Ethical Drug advertising agencies during the two and a half years of the interim period.

Further, appellee's efforts to secure employment in her field were characterized by an expert in the industry as "not very strong". (Ref.Tr. 441). Specifically, Mr. Braunworth, a personnel director for eleven and a half years in one of the largest pharmaceutical advertising firms in New York, stated:

> You know, for somebody out of work for two years to make 19 contacts in which two are Ethical Drug advertising agencies, does not imply to me a very strong looking for a job...

(Ref.Tr. 441)

In light of the above, the question becomes: is it reasonable for an individual with a certain expertise in a specialized field to explore only two employment possibilities when there are at least fifteen other possibilities equally

available in this same specialized field? Appellant, KPR, must answer this query in the negative. This is particularly so when it is remembered that the appellee stated at least once that her financial situation was getting desperate. (Ref.Tr.177). Additionally, for a substantial time during the interim period, the job market in appellee's industry was "very attractive". (Ref.Tr. 295 and 291).

The appellant submits that the record reveals both a favorable climate for employment opportunities in appellee's field during the interim period, and that Ms. McGee did not take reasonable steps in seeking out such employment. In a field where a mere fifteen or so firms exist, it is highly questionable conduct to affirmatively act with regard to only two such firms in seeking an employment opening. At the very least, said conduct evinces an unreasonable neglect by appellee to take the normal steps in securing employment.

In this regard, Mr. Braunworth noted that the fact that appellee had contacted only two Ethical Drug Agencies was suspect and that an individual with Ms. McGee's background would be expected, at the very minimum, to contact <u>all</u> the pharmaceutical advertising agencies in the area. (Ref.Tr. 435).

Thus, the very least that should be expected from an alleged discriminatee in her position is that employment opportunities in one's own field be reasonably and adequately explored. As such, the trial court's failure to consider the

testimony concerning appellee's weak efforts to secure employment as put forth by an expert in the field is reversible error and mandates that the finding of appellee's "reasonableness" be overturned.

At this juncture, it must also be noted that the court below erroneously characterized appellant's position with regard to the mitigation doctrine. At page 10 of the Opinion, it is stated (App. A-244):

> [Appellant's] position is that the failure of plaintiff to use all available means of pursuing employment opportunities establishes lack of due diligence in seeking employment. (emphasis supplied).

This statement is an incorrect interpretation of appellant's argument. The appellant has never contended that Ms. McGee should have explored all employment opportunities. Rather, appellant has confined itself to the issue of the reasonableness of the appellee's actions in searching for interim employment. This is the law. See Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Thus, appellant's offer of proof that pharmaceutical advertising was a relatively insular field and that only twenty firms in New York specialized in this area, is offered as evidence that appellee's efforts to seek employment in this industry-- the area of her own training and expertise-- were not diligent or reasonable under the circumstances as a matter of law. It is respectfully submitted that a reasonable person seeking

employment would have contacted more than two firms specializing in that person's field; particularly when the field consists of a mere twenty organizations. Appellee's failure to do so was unreasonable and the lower court's finding to the contrary was clearly erroneous.

b) The Methods Used By Appellee In Her Search For Interim Employment Were Unreasonable

Although the standard of "reasonable diligence" is not absolute, see Florence Printing Co. v. N.L.R.B., 376 F.2d 216 (4th Cir.), cert. denied, 389 U.S. 840 (1967), it is clear that a discriminatee must affirmatively, reasonably, and diligently employ proper methods in finding suitable or substantially similar interim employment so as to avoid or lessen the damages claimed to be owing. See Sprogis v. United Air Lines, Inc., 517 F.2d 387 (7th Cir. 1975).

The record reveals that appellee employed methods and tactics that failed to reach a reasonable number of prospective employers in her field. Further, appellee failed to adopt a simple follow-up approach with regard to the few employers she did contact. In short, the methods employed by Ms. McGee in locating employment were not reasonably calculated to actually place her in such emplyment, and as such, appellee did not "diligently seek other suitable employment." Albermarle Paper Co. v. Moody, supra.

In the instant case, it is clear that the interviewing techniques employed by Ms. McGee were unreasonable. On at least one occasion appellee told a prospective employer that she was out of work. (Ref.Tr. 140). It is apparent from a reading of the record that the Magistrate, himself, thought that appellee's conduct at job interviews was highly suspect. (Ref. Tr. 140-41). Specifically the Magistrate noted:

> people... looking for jobs... don't reveal that they are not working at the time... If you do anything to indicate to people that you are not desirable, it seems to me you are not doing what is reasonable.

(Ref.Tr. 144).

Further evidence and proof that appellee's methods in seeking employment were unreasonable is Ms. McGee's own testimony concerning her use of newspaper advertisements. It is an undisputed fact that numerous advertising companies advertised in the New York Times during the period in question and that such advertising was an acceptable means by which employers might fill any positions related to appellee's field. (Ref.Tr. 347). Yet, although the appellee claimed to have read the Times, and stated that she would have answered advertisements in her field (Ref.Tr. 197-98), the plain facts are that: (1) Ms. McGee never answered one advertisement; (2) appellee implied that a major factor in not answering such advertisements was that her phone was "not working" (Ref.Tr. 196); (3) on several occasions appellee stated that because a particular advertisement was not exactly

comparable to her previous duties at KPR she would not have responded to it. (Ref.Tr. 212).

Additionally, appellee's method of using resumes was unreasonable. It is a basic tenet of "job hunting" that a first, logical and reasonable step is the preparation and mailing of resumes to prospective employers. Yet, appellee implied that she had difficulties drafting a resume because she had to type it herself on a church typewriter (Ref.Tr. 276) and, further, that she was unable to send more than ten resumes at any one time since each copy cost ten cents. (Ref.Tr. 277). Finally, appellee admitted that in the three year interim period she made a mere one hundred resumes and when asked how many were actually used, appellee admitted that they might be lost or around the apartment. (Ref.Tr. 277). Clearly, appellee's conduct evidences a lack of diligence in the use of resumes, falling far below the ordinary and reasonable methods required of a sincere, prospective employee.

In determining whether or not the methods used by appellee were reasonable and diligent, the record must be considered as a whole with respect to each individual. See N.L.R.B. v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966). The particular facts concerning each individual must be considered. United States v. Air Conditioning Corp., 336 F.2d 275 (6th Cir. 1964).

Keeping the above principles in mind, it is apparent

that the lower court erred in holding that the efforts employed by Ms. McGee to find work were reasonable. It has been shown that appelle's use of both resumes and newspaper advertisements were unreasonable. Further, the record reveals that in most instances appellee relied on telephone calls to establish contacts within agencies, that such use was not the usual means of obtaining employment, and that telephoning a prospective employer is not the accepted or reasonable method used to further oneself in appellee's field (Ref. Tr. 331). In short, considering appellee's particular area of expertise and her field specifically, appellant vigorously contends that Ms. McGee failed to employ reasonable methods to obtain suitable interim work.

With regard to the above, the record is clear.

> Q: Tell the court the <u>method</u> by which account management people over the last three years have either sought you out or you have found them. (emphasis supplied)
>
> A: [Mr. Braunworth]: The main tool for anybody in an advertising agency, I think it goes without saying, anybody in our industry in a professional capacity, there is a cardinal rule: You look at Ad Age in February of each year, and you coincide that with the Advertising Agency Red Book, and you have got a main list of 500 or better advertising agencies and people to write to and their addresses, billings, and the type of clients.

(Ref. Tr. 435).

Nowhere in the record is there testimony to the effect that appellee made use of either Ad Age or the Advertising Agency

Red Book -- the "bible of the advertising world" (Ref. Tr. 424). In fact, the opposite is true, as the foregoing has made clear.[6] Thus, appellant has shown that Ms. McGee's methods to secure employment were not undertaken sincerely, diligently, or reasonably. It is submitted that the court below failed to consider the question of reasonableness in light of similarly situated individuals in appellee's particular field and individuals with appellee's specific expertise. The issue of "reasonable diligence" cannot be determined in a vacuum, See Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and the trial court's failure to consider testimony by experts in the pharmaceutical advertising field as that testimony applied to appellee's methods of seeking employment, establishes clear error and mandates a reversal.

c) The Award Of Back Pay To Appellee For The Period Subsequent To September, 1975 Was Error

By her own admission, appellee ceased searching

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6. This is not to say, nor does appellant contend, that Mr. Braunworth's testimony represents the sole method to be used by an account executive seeking employment. However, when this testimony is viewed in connection with the actual efforts made by appellee, it becomes apparent that Ms. McGee did not act as a reasonable account executive would have acted in a similar situation.

for alternative employment in September, 1975, (Ref. Tr. 199). It is appellant's contention that this fact establishes unreasonableness and as such the lower court erred in awarding back pay to appellee for this time period.

In United States v. Wood, Wire and Metal Co., 328 F. Supp 429, 443 (S.D.N.Y. 1971) the court held that a plaintiff seeking an award of back pay:

> must prove as a first step a sufficient investment of time and effort to show that he was ready, willing, and available to take work.

It is of no import that appellee expected to be reinstated following the Court's earlier opinion or that the employment opportunities in her field were poor during 1975; rather, the burden of proof remains at all times upon the appellant to show that Ms. McGee failed to take reasonable and diligent steps to find alternative employment. See Heinrich Motors, Inc. v. NLRB, 403 F.2d 145 (2nd Cir. 1968).

It is vigorously contended that by not making any efforts at all subsequent to September 1975, the appellee was not diligent in mitigating her damages as a matter of law. The reasons given for her conduct are equally unreasonable since at all times appellee was represented by able counsel, the remedy of reinstatement was entirely discretionary[7], and

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7. 42 U.S.C. § 2000e-5(g): "The court may ... order such affirmative action as may be appropriate" (emphasis supplied).

the fact that Ms. McGee failed to take any steps to seek employment negates the claim by her that employment opportunities were scarce. See, United States v. Wood, Wire and Metal Co., supra.

The fact remains that a discriminatee is under a duty to take affirmative action in exploring employment openings. Only after this affirmative action has been shown is it possible for a defendant to prove that said action was unreasonable or not diligent.

In NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1319 (D.C. Cir. 1972) the court squarely faced this issue and held:

> [T]he employer is not under the severe burden of establishing that a particular discriminatee would have located suitable interim employment had he only made the required effort, before the back pay liability may properly be reduced. "With such diligence lacking, the circumstance of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant."

There being no effort by appellee to find employment subsequent to September, 1975; this Court must find that there has been "a willful loss of earnings." See NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2nd Cir. 1965).[8]

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8. The cases relied upon by the lower court in support for the principle that appellant is required not only to prove lack of due diligence, but also that appellee might have found employment and had some earnings (Opinion at 14, n. 17) are not

d) The Magistrate's Refusal To Examine The Question Of Loans Received By Appellee During The Interim Period Was Error

As previously stated 42 U.S.C. § 20003-5(g) requires that the amount of back pay is subject to certain deductions. One such deduction is termed "interim earnings." That is, any income obtained by the discriminatee during the interim period must be deducted from any award of back pay.

The Magistrate failed to consider the question of several private loans made to the appellee and closed off inquiry as to whether such "loans" were to be paid back by Ms. McGee (Ref. Tr. 186-189). The importance of an inquiry into the circumstances surrounding any loans made to appellee is obvious, since any monies received by appellee that were not expected to be repaid (with interest) must be considered interim earnings for purposes of § 2000e-5(g). See NLRB v. Nicky Chevrolet Sales, Inc., 493 F.2d 103 (7th Cir.), cert. denied, 419 U.S. 834 (1974).

Thus, appellant respectfully submits that a further

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8. (cont'd) on point. In those cases there was no question that there had been some effort made by the discriminatee to find employment. The issue was whether or not such efforts were reasonable or diligent in light of the prevailing job market. The courts did not go so far as to hold that in a situation, as in the instant case, where no action has been taken whatsoever, the employer must still prove market openings. (App. A-248).

hearing is necessary to determine the full extent of any monies paid to Ms. McGee by commercial lenders or otherwise, and the circumstances and expectations surrounding such payments.

In this regard, the appellant was denied its sixth amendment right to cross-examination when Magistrate Hartenstine shut off inquiry into the question of any monies loaned to appellee (Ref. Tr. 186-89). By letter dated November 21, 1975 addressed to Hon. Edward Weinfeld, the presiding justice in the instant case, and by copy of this letter sent to Magistrate Hartenstine, the appellee seized upon the opportunity to communicate directly with the above named individuals; specifically mentioning to them that it had "been necessary for [appellee] to borrow almost $10,000 from friends and relatives. . ." and that "in order to live [appellee] was forced to accept $1,000 from [her] 87 year old aunt's 'coffin money'" (A-276 and 277).

Putting aside the question of the propriety of such action and the fact that appellee was warned that such conduct was impermissible (App. A-273), it remains true that by "opening the door" in this unilateral manner, the appellee prejudiced the rights of appellant. It seems unnecessary to discuss at length here, the vital importance of fully exploring the circumstances of the loans, especially in light of the fact that Ms. McGee herself admitted that friends and relatives were involved in the payments.[9]

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9. It should be noted that the first time counsel for

Were these loans to be paid back by appellee? If they were not, then the money represents income and should have been deducted from appellee's award of back pay. It also could reduce the desire to seek other reasonable employment. This question should have been entertained by the court below, as well as by the Magistrate, and failure to do so was reversible error; particularly when both Magistrate and trial judge had been previously appraised of the existence of these monies.

e) The Award of Back Pay To Appellee For The Eight Month Period Between The Magistrate's Hearing And The Date Of Judgment Was Error

One further inequity in the case at bar is the fact that the trial judge did not consider that Ms. McGee may have found alternative employment or other sources of income during the interim between the hearing on damages and the judgment entered on October 8, 1976. The last time that appellee was under oath was on February 25, 1976 at the hearing before Magistrate Hartenstine. In computing back pay the court below completely ignored this eight month period and, in so doing, committed error.

Appellee is entitled to be made whole but is not entitled to reap a windfall at the appellant's expense. The precedent set by permitting a discriminatee to be compensated without a determination as to the actual injury incurred cannot be allowed to stand. The trial court should have, at least, required appellee

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9. (cont'd.) appellant was made aware of the correspondence in question was by motion made by Ms. McGee's counsel to withdraw as attorneys for plaintiff-intervenor dated January 27, 1976 (App. 253 et seq.).

to submit an affidavit as to whether or not she had obtained employment from the time of the hearing. The failure to elicit from Ms. McGee sworn testimony as to her actual financial situation prior to entering judgment unduly prejudiced the appellant.

If such procedure is permitted to stand the inequitable repercussions will be felt far beyond this case. A very real possibility exists that discriminatees will make use of the knowledge that extended damage hearings subsequent to the trial on the issue of liability will be to their advantage, since their financial circumstances will cease being investigated during such period, and if they find employment they will be "paid twice".

Thus, the trial court erred in not taking into account the economic realities of Ms. McGee's situation before rendering judgment, and any back pay awarded to appellee for this interim period must not be upheld.

Point

V

THE COURT BELOW ABUSED ITS DISCRETION BY AWARDING TO APPELLEE A YEAR'S FUTURE SALARY BECAUSE SUCH PAYMENT CANNOT BE PROPERLY SUPERVISED

Without citing any authority and going far beyond any previous holding in cases concerned with the issue of back pay awards, the court below awarded to the appellee a full one year's salary of $22,881.38. The sole reason given for such unprecedented action was that it would have been unfair not to compensate appellee for failing to reinstate her, and that given the economic climate in the pharmaceutical advertising industry, it could be assumed that within one year appellee would be able to find suitable employment. See Opinion at 17. (App. A-251).

Appellant respectfully contends that the payment of one year's future pay to Ms. McGee circumvents the purpose of the back pay provision and disregards the legislative intent of 42 U.S.C. § 2000e-5(g). As enunciated by Congress:

> The provisions of [42 U.S.C. § 2000e-5(g)] are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible ...

Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunities Act of 1972 - Conference Report, 118 Cong. Rec. 7166 (1972).

However, it has been noted that with regard to the wide discretion afforded district courts in granting relief under 42 U.S.C. § 2000e-5(g), and the 1972 legislative policy to liberally grant such relief,

> [t]here is nothing in either of those sources to suggest that rectifying economic losses from past wrongs requires the district courts to disregard normal equitable considerations.

Franks v. Bowman Transportation Co., 424 U.S. 747, 785 (1976) (Powell, J., concurring in part and dissenting in part). By providing the appellee with a year's future pay the court below abused its discretion and, as such, this portion of the award must be set aside.

In awarding back pay to discriminatees the trial court "must consider economic reality and the physical and fiscal limitations of the court to properly grant and supervise relief." United States v. Georgia Power Co., 474 F.2d 906, 922 (5th Cir. 1973). Appellant vigorously contends that inherent in the lower court's payment to Ms. McGee of one year's future salary is the impossibility of adequate supervision by the court. No provision is made for the contingency that appellee will find employment before the year has elapsed.

The law is clear that the purpose of back pay is to make the discriminatee "whole". See Albermarle Paper Co. v. Moody, supra. However, by awarding a lump sum payment of a year's salary without properly safeguarding the employer's

right not to be punished in the event that appellee obtains employment within the year, see Bush v. Lone Star Steel Co., 373 F. Supp. 526, 537 (E.D. Tex. 1974) the court has set a dangerous precedent.

If one of the purposes behind § 2000e-5(g) is to promote production and employment, see Albermarle Paper Co. v. Moody, supra, then it is apparent that the award of a lump sum future pay in the case at bar cannot and does not promote this goal. It is a reasonable conclusion that a discriminatee receiving such payment might cease any diligent efforts to seek employment since the need and urgency to obtain such employment would necessarily be greatly diminished. In short, by awarding the year's future salary, the court below effectively removed any incentive that Ms. McGee might have for continuing her search for employment, did not even consider the possibility that appellee would successfully obtain work before the year ran; thus creating a windfall for appellee, and punished the appellant for its alleged retaliatory conduct.

It is submitted that the foregoing mandates a reversal on the issue of this particular payment to appellee. At the very least a remand is required so as to allow the court to provide proper safeguards. For example, perhaps the future salary should be put in an escrow account and appellee paid periodically until alternate employment is, in fact, obtained. Another plan might make the payment to

appellee subject to her paying back to appellant a portion of the monies if Ms. McGee is successful in finding employment before the one year period has ended. In any event, the foregoing is intended to be illustrative and not exhaustive.

Additionally, the lower court awarded six percent interest on the future year's salary. Appellant submits that the award of interest imposes a further inequitable burden upon appellant and, as such, is an abuse of discretion. It has previously been shown that the payment of future pay is, itself, so speculative as to render meaningless the remedial purposes of Title VII. The award of interest accelerates the trend away from the original intent of §2000(e)-5(g); which was to restore a successful claimant to a position she would have occupied were it not for the discriminatory acts. What is left is the unwarranted imposition of an extra measure of damage which penalizes the appellant and unduly enriches the appellee.

Thus, the lower court has abused its discretion by not properly considering economic realities and by not adequately adopting standards by which the proposed future payment may be accomplished equitably, fairly and reasonably.

C O N C L U S I O N

For the foregoing reasons, it is respectfully submitted that the decision below was clearly erroneous and a reversal is mandated. Alternatively, it is contended that this Court must remand for further proceedings with regard to both the issues of liability and damages.

Dated: February 14, 1977
New York, N.Y.

Respectfully submitted,

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Of Counsel:
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN Q. HAYES, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 162 NAVY WALK APT 6A BROOKLYN N.Y. 11201.

That on the 24 day of FEBRUARY, 1977, deponent personally served the within BRIEF FOR KALLIR, PHILIPS, ROSS, INC., DEFENDANT-APPELLANT-APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing ____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

1. RONALD COPELAND
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Allen Q. Hayes

Sworn to before me this
24th day of February, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977